APPEAL FROM ORIGINAL CIVIL.

1886 February 26.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

GOPAL CHANDRA LAHIRI (PLAINTIFF) *v.* SOLOMON (DEFENDANT).*

Review—Mistake of Counsel—Civil Procedure Code (Act XIV of 1882), s. 623—Limitation Act (XV of 1877), s. 5—"Sufficient Cause."

Per GARTH, C.J.—Although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words "any other sufficient reason" in s. 623 of the Civil Procedure Code, yet from the earlier part of the clause it is clear that a point which might have been, but which was not, discovered at the trial *by the exercise of due diligence*, was not intended by the section to afford any sufficient reason for review.

Per WILSON, J.—*Semble.*—If at a trial all parties, counsel on both sides, and the Judge, are under a misapprehension as to the contents of a document, or, even if the Judge alone is misled on such a point, and in consequence a wrong decree is made, the mistake ought to be corrected on review.

Per Curiam.—Held on the facts, that there was no "sufficient cause" for not making the application within the time limited by s. 5 of the Limitation Act, 1877.

THIS was an appeal from a decision of Mr. Justice Norris granting an application for a review.

The facts of the case are fully set out in the report of the case before the lower Court to be found on page 767 of I. L. R., 11 Calc.

Mr. *Allen*, Mr. *Mitra* and Mr. *J. G. Apcar* for the appellant.

Mr. *Bonnerjee* and Mr. *Gasper*, for the respondent.

The only two points argued were: (1) Whether there was reason sufficient for granting the review; and (2), whether the appliction was in time?

The following judgments were delivered by the Court (GARTH, C.J., and WILSON, J.):—

GARTH, C.J.—This is an appeal against an order of Mr. Justice Norris granting an application for review. The facts are somewhat peculiar.

The suit was brought by the plaintiff against the defendant Bibi Solomon, to recover a portion of certain property which the plaintiff claimed as having been conveyed to him by one Khajah

* Original Civil Appeal No. 28 of 1885, against the decree of Mr. Justice Norris, dated the 16th of July 1885.

Abdul Azeez, the brother of the defendant, under a conveyance dated the 19th of March 1883.

Mr. Phillips, who appeared for the plaintiff at the trial, opened the plaintiff's case, and claimed the property in question as having been conveyed to his client by that deed. The deed itself was produced and proved in the usual way, and as the counsel for the defendant raised no objection to the conveyance, it was taken as read.

The written statement raised the question as to the *bona fides* of the deed, as also whether Bibi Solomon's estate passed by it; but the only defence apparently which was put forward by the defendant's counsel, was that the deed was fraudulent and void as against Bibi Solomon, and that the plaintiff was merely a trustee of the property conveyed.

This defence, however, the learned Judge considered that the defendant was not entitled to raise in such a suit; and consequently the plaintiff obtained judgment. This was on the 5th of February 1885.

On the 26th of the same month the defendant Bibi Solomon brought a fresh suit against the plaintiff, praying, amongst other things, that it might be declared that the transaction evidenced by the said indenture of the 19th of March 1883 was invalid and inoperative, or that at all events it was fraudulent and void against her, Bibi Solomon. In fact that suit was founded on the same grounds as the defendant's counsel desired to set up as a defence to this suit.

On the 2nd of March notice was served on behalf of Bibi Solomon upon the plaintiff in this suit of an application that the decree in the first suit should not be executed until the suit brought by Bibi Solomon had been disposed of; and that application was heard by Mr. Justice Wilson on the 30th and 31st of March.

Mr. Bonnerjee and Mr. Gasper appeared in support of it, and Mr. Hill and Mr. O'Kinealy against it.

In the course of that hearing, Mr. Bonnerjee called for the conveyance of the 19th of March 1883, and on reading it discovered that, according to his construction of the deed, Bibi Solomon's interest in the said property, (being a $\frac{7}{24}$th share) did not pass by the instrument.

On the 9th of April following, Mr. Hill made an application to

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Mr. Justice Norris, who tried the suit, for a rule to show cause why there should not be a review of judgment.

A rule *nisi* was granted; and on its coming on to be argued before Mr. Justice Norris, it turned out that, although the defendant had not been allowed before the trial to inspect the original deed of the 19th of March 1883, upon the ground that it was the plaintiff's title deed, the defendant's attorney had been supplied with a copy of it for the purpose of preparing the written statement, and also that each of the counsel for the defendant, Mr. Bonnerjee and Mr. Gasper, had copies of the deed supplied them at the trial.

Two objections were raised on the argument of the rule: 1*st*, whether there was sufficient reason for granting the review; and, 2*ndly*, whether there was sufficient cause for not applying for the review within the 20 days allowed by the Limitation Act.

Both these points, after some hesitation, the learned Judge decided in favor of the applicant; and the rule was made absolute for a review.

This is an appeal against that decision; and the questions submitted to us in appeal were those which were raised in the lower Court, namely, 1*st*, whether there was sufficient reason for granting the review; and, 2*ndly*, whether the application was in time.

Now, as to the first of these points, the material facts, as I understand them, are these—

The claim to the property in suit as conveyed by the deed in question was *bonâ fide* made by the plaintiff at the trial. It is not suggested that there was any want of good faith in the way in which the plaintiff's case was presented or conducted, or that there was any attempt to put a construction upon the deed, which the plaintiff's advisers did not believe to be correct.

The deed itself in the operative part of it professed to convey to the plaintiff the whole of the house and premises which were the subject of the suit; and it was only by a careful examination of the recitals that the point raised by Mr. Bonnerjee in his application for review was discovered.

The defendant's advisers, her attorney and counsel, had ample opportunity for examining the deed, and of ascertaining its true construction before the trial. They had a copy of it furnished

to them for preparing the written statement, and each of the counsel at the trial had also a copy in his brief. If, therefore, they failed at the trial to see the point now raised, it was entirely their own fault.

Mr. Bonnerjee very properly and candidly admits that he did not read the deed. His attorney did not call his attention to the point now raised, and he had no reason to suppose that there was anything in the document which required examination. But whether the omission was his or the attorney's, it is obvious that the point was one which, by the exercise of due diligence, would have been discovered.

To allow a review under such circumstances would, I think, be acting in opposition, both to the letter and the spirit of s. 623 of the Code. It may be difficult no doubt, and perhaps undesirable, to attempt to define precisely the meaning of the words "*any other sufficient reason*" in that section; but it is clear from the earlier part of the clause that a point which might have been, but which was not, discovered at the trial *by the exercise of due diligence*, was not intended by the section to afford any sufficient reason for review.

But secondly the question as to limitation appears to me to present at least as much difficulty as the other.

The judgment was given on the 5th of February 1885; the decree was signed on 25th day of February 1885; but the application for review was not made until the 9th of April, long after the 20 days prescribed by the Limitation Act had expired.

Mr. Bonnerjee contends that there was sufficient cause, within the meaning of s. 5 of the Act, for not making the application within the 20 days. But what is the alleged cause? Merely that the learned counsel did not happen to read the deed until the 30th of March, when he did so for the purpose of a proceeding in another suit. If this were to be deemed a sufficient excuse for the application not being made in due time, it would be an equally good excuse for delaying the application for a year or any longer time, whenever the learned counsel might happen to read its contents.

The case of *In re The Manchester Economic Building Society*

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(1) was cited to us as an authority in favor of extending the time; but that case is no authority in favor of the respondent.

Even assuming the rules upon this subject in England to be the same as they are here, it will be found that in the case of the *Manchester Economic Building Society*, the fact which was made the ground for allowing the appeal after time, was one which the applicant was not, and could not, even by the exercise of due diligence, have been made aware of at the time when order was made which was sought to be appealed against.

I think that the appeal should be allowed, and the application for review dismissed with costs.

WILSON, J.—Upon the first question whether there were in this case grounds upon which a review could be granted, I express no opinion. If at a trial all parties, counsel on both sides, and the Judge are under a misapprehension as to the contents of a document, or even if the Judge alone is misled on such a point, and in consequence a wrong decree is made, I am disposed to think that the mistake ought to be corrected on review.

Upon the question whether there was sufficient cause for not applying within the time limited by law, I agree with the Chief Justice.

T. A. P. *Appeal allowed.*

Attorney for the appellant: Mr. *C. F. Pittar.*

Attorney for the respondent: Messrs. *Watkins & Co.*

INSOLVENCY.

Before Mr. Justice Norris.

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March 3.

IN RE MAHOMED MAHMUD SHAH, AN INSOLVENT.

Insolvency—Interest on scheduled debts—Official Assignee's Commission on interest.

Where an insolvent's estate is sufficient to pay off his creditors in full, leaving a balance in the hands of the Official Assignee, the Court will direct interest at 6 per cent. to be paid on such proved or admitted contract debts as expressly or impliedly carry interest as from the date of the filing of the petition in insolvency; and will allow the Official Assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands, to be made over to the insolvent.

(1) L. R., 24 Ch. D., 488.